United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

SIGNATURE COPY

74-1168

74-1348

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WARNER BROS., INC. and COLUMBIA PICTURES INDUSTRIES, INC., Petitioners,	)	
v.	)	Case No. 74-1348
FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, Respondents,	)	
AMERICAN BROADCASTING COMPANIES, INC., et al., Intervenors.	)	

ON PETITION FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR
AMERICAN BROADCASTING COMPANIES, INC.

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2. Whether the revised Rule is consistent with the First Amendment of the United States Constitution and Section 326 of the Communications Act.

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BRIEF FOR INTERVENOR AMERICAN BROADCASTING COMPANIES, INC.

PRELIMINARY STATEMENT

Case No. 74-1348, brought by Warner Bros., Inc. and Columbia Pictures Industries, Inc. (Warner-Columbia), is the third filed Petition for Review of the Report and Order of the Federal Communications Commission (Commission) released February 6, 1974. Case Nos. 74-1168 and 74-1283 were brought by National Association of Independent Television Producers and Distributors (NAITPD) and Westinghouse

Broadcasting Company, Inc. (Westinghouse), respectively. The Court has ordered that the three cases be heard together and the Commission has moved for their consolidation for all purposes.

Responsive to the special briefing schedule established by this Court, Intervenor American Broadcasting Companies, Inc. (ABC) on April 1, 1974 filed its Brief in Case Nos. 74-1168 and 74-1283. Because the Warner-Columbia Brief was not filed until March 28, 1974 and received through mail service until March 29, 1974, ABC did not find it feasible to consolidate its response to Warner-Columbia with its Brief in Nos. 74-1168 and 74-1283. Consequently, this separate Brief is being submitted.

Although Petitioners Warner-Columbia seek different ultimate relief than Petitioners NAITPD and Westinghouse, there is an obvious overlap in the issues which the several Petitions raise. In the interest of brevity, ABC does not here restate in detail the arguments advanced in its April 1, 1974 Brief in support of the Commission's Report and Order. Rather, such arguments are incorporated herein by reference and this Brief is limited to certain additional points as seem warranted.

COUNTERSTATEMENT OF THE CASE

ABC adopts the Counterstatement of the Case in the Brief for Respondent Commission,*/ as Supplemented by the Counterstatement of the Case in Brief for Intervenor ABC in Case Nos. 74-1168 and 74-1283.

ARGUMENT

I. The Commission's Decision to Continue a Form of Prime Time Access Rule Was a Reasonable Exercise of Administrative Discretion

A. Courts Have a Limited Review Function

The Commission's Report and Order is the culmination of a rule making proceeding to overview the Prime Time Access Rule (47 C.F.R. §73.658(k)). This overview included consideration of whether to repeal the Rule. The Commission decided to retain the Rule in somewhat revised form, concluding that it was premature to make a final judgment on the Rule's future. Report and Order**/, paras. 1 and 3.

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*/ ABC's Brief in Case Nos. 74-1168 and 74-1283 erroneously referred to Respondent Commission's Brief as also that of the United States of America. The error arose because, due to time pressures, the Counterstatement was reviewed in draft only and ABC was under the impression that both Respondents were filing a single Brief.

**/ The Commission's Report and Order is reproduced in the Case Nos. 74-1168 and 74-1283 Joint Appendix at 51-179.

In such a case the scope of judicial review is limited. As succinctly stated in Radio Relay Corp. v. FCC, 409 F.2d 322 (2d Cir. 1969):

> "In such cases our task is limited to determining 'whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear'; that is, 'whether the Commission has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of "public interest."' F.C.C. v. RCA Communications, Inc., 346 U.S. 86, 91, 73 S.Ct. 998, 97 L.Ed. 1470 (1953). Thus, 'courts should not overrule an administrative decision merely because they disagree with its wisdom,' but only if they find it to be 'arbitrary or against the public interest as a matter of law.' Radio Corp. v. United States, 341 U.S. 412, 420, 71 S.Ct. 806, 810, 95 L.Ed. 1062 (1951)." (409 F.2d at 326).

It should also be noted that it was clearly within the Commission's authority and responsibility to conduct an overview of the Rule and to decide whether changes should be made. American Trucking Ass'n v. A.T. & S.F.RR. Co., 387 U.S. 397 (1967). Indeed, this has been characterized as part of the "genius" of the administrative process. American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966). Moreover, in formulating a regulatory remedy the Commission has broad discretion and the Commission is the body with the statutory duty of choosing the proper remedy. American Power and Light Company v. SEC, 329 U.S. 90 (1946).

B. The Commission Concluded That the Rule Had Not Yet Been Adequately Tested to Permit a Final Decision on Its Future

In adopting the Rule in the first instance, the Commission sought to diversify the sources of prime time programming through curtailing the use of network-originated programming one half-hour per night. The Rule resulted in the removal of network programming from the 7:30 - 8:00 p.m. half hour weeknights and the 10:30 - 11:00 p.m. half hour Sundays, which periods it had traditionally occupied. The newly opened half hour was thus available for other program sources and suppliers. To give the Rule opportunity to function effectively, the Commission also imposed restrictions on the kind of program product, other than network programs, which affected stations could utilize. It excluded off-network product and movies shown in the market within two years. This was affirmed as a reasonable exercise of Commission jurisdiction in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

Less than one month after the Rule first became fully effective, the Commission initiated its Docket No. 19622 overview proceeding. That proceeding lasted for more than one year without an announced decision. During this period no one in the television industry knew, or could be confident

about, the outcome of the Commission's deliberations and hence the Rule's future. Business entities concerned with the access programming market could only proceed at their peril.

The Commission, in its Report and Order, recognized the impossibility of making a definitive assessment of the Rule on the basis of only limited experience, particularly experience that was unrepresentative because of the psychological effect of the overview proceeding (paras. 89 and 82). With these factors in mind it prudently concluded that the Rule had not yet had a sufficient test (paras. 89-91, 82). To the extent that the Commission could make judgments about the Rule based upon limited experience, it undertook to do so (paras. 89-100). Indeed, the Commission made relatively minor refinements in the Rule designed to make it more effective and to accomplish other public interest objectives (paras. 77-88). The critical Commission conclusion, however, was that the experience with the Rule to date was inadequate to make a definitive judgment on its future.

C. The Commission Found Both Discouraging and Encouraging Aspects in the Rule's Operation To Date

Petitioners go to some length in their Brief to point out those tentative findings of the Commission which may be considered unfavorable to the Rule. However, there

are other findings in the Report and Order which suggest that the Rule is achieving, or may achieve, its intended objectives. Thus, while the Commission could characterize the Rule's performance to date as "somewhat mediocre" (para. 89),*/ it also found encouragement in such matters as two particular new programs offered for the 1973-74 season (paras. 90 and 93); the fact that the percentage of foreign product in the access market was less in 1973 than in 1972; the expansion of programming in the informational "nature-outdoors" area; and, of great importance, that local programming efforts, particularly in the highly significant news and public affairs areas, were present and increasing (paras. 93 and 91). While the Commission gave indication that it would not be satisfied indefinitely with the programming results to date, it made clear that these results could not justify repeal of the Rule at the present time (paras. 89 and 82).

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*/ The Commission's partial dissatisfaction related to the program results in the access period. Specifically, it cited as grounds for concern the practice of stripping (multiple episodes of the same show per week), particularly game shows; use of foreign produced programs; and a decline in drama. While not criticizing "game" shows outright, it also questioned the desirability of "sixth" episode programs based upon network weekday series. Report and Order, para. 92.

It is also significant that the Rule has resulted in benefits which were not originally anticipated. One such benefit mentioned by the Commission at para. 81 is the improved competitive position of independent (not network-affiliated) stations, many of which are UHF and operate at a substantial competitive disadvantage as a consequence. Association of Independent Television Stations, Inc. (INTV) strongly supported continuation of the Rule, and INTV has not sought review of the Commission's Report and Order adopting a modified Rule.

The Rule has also had the benefit of enhancing inter-network competition. Specifically, the record before the Commission shows that the Rule has contributed to turning the ABC Television Network from a loss operation to a profit operation, with attendant public interest benefits for ABC Television Network programming. During the period 1963-71 the ABC Television Network lost over $100,000,000 while the other two networks were amassing combined profits in excess of $600,000,000. In 1972 the ABC Television Network showed a profit. This change to a position of profitability has permitted ABC to expand news and public affairs programming and other areas of programming with strong public interest

ramifications. See Brief for Intervenor ABC in Case Nos. 74-1168 and 74-1283, Appendix A.

Petitioners argue that the Commission no longer holds out any favorable expectations for the Rule, based in part upon the fact that the Report and Order did not make specific prognostications. What this argument overlooks is that the Commission was not dealing with this subject for the first time. The stated background included objectives expressed in 1970 and approved by this Court in the Mt. Mansfield case; the Commission gave no indication of any change in those objectives. In fact, the presumption established by the Notice of Inquiry and Notice of Proposed Rule Making,*/ para. 15, was in favor of retention.

The Commission specifically rejected the contentions advanced by companies like Warner and Columbia that "nothing different is to be expected in the future" (paras. 89-90), and said that it was important "to preserve considerable potential for the development of first-run syndicated programming" (para. 82).

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*/ The Notice is reproduced in Case Nos. 74-1168 and 74-1283 at Joint Appendix 1-33.

D. The Refinements in the Rule Adopted by the Commission Were Designed to Make it More Effective and Accomplish Other Public Interest Objectives

The Commission's Report and Order, at paragraph 78, points out that there are essentia-ly five areas of Rule change. The Report and Order goes on in succeeding paragraphs to explain the reasons for each change.

Briefly (and without summarizing all reasons):

(1) The removal of the 7:00 - 7:30 p.m. restriction reflected that this time period, at least Monday through Friday, did not appear to offer significant potential for the kind of programming which the Commission seeks to foster; it also involved problems of administration (paras. 79-80).

(2) Specific designation of the access half hour as 7:30 - 8:00 p.m. was done in the interest of certainty and stability -- letting networks and stations know what time will or will not be available for use and giving independent producers a specific time period, and hence composition of audience, at which to aim (para. 85).

(3) The complete ban on feature films was to further the objective of encouraging new material, which features are not, as well as to simplify rule administration (paras. 86-87).

(4) Removing the restriction upon Sunday entirely and permitting network or off-network programming in specific categories for one access half hour per week was not intended so much to make the Rule work better but to achieve other public interest objectives. Thus, the Commission felt since Sunday is traditionally a family viewing night that it was desirable for networks to be in a position to program from 7:00 p.m. as well as to offer some additional programming (para. 79).

(5) Similarly, the provision allowing networks to program children's specials, public affairs or documentaries in one access half hour per week was intended to permit these kinds of programs, which have special public interest characteristics, to be more widely available and, in the case of children's programming, more widely available at an early evening hour appropriate for children (paras. 83-84).

In sum, it is clear that the Commission did not forsake the objectives which prompted adoption of the original Rule. Rather, it concluded that the Rule had not been given the meaningful test needed to determine if those objectives will be realized. Meanwhile, other benefits have become associated with the Rule's operation. Revisions in

the Rule, based upon limited experience, have been made both to make it more effective and to foster other public interest objectives which are part of the Commission's regulatory responsibility.

Taking into account the limited scope of judicial review of this Commission action and bearing in mind what the Commission did and why it took such action, it can not be said that the agency abused its broad discretion.

II. Continuation of the Rule in Revised Form is Not Barred By the First Amendment or Section 326

This Court affirmed the Commission's adoption of the original Prime Time Access Rule (including off-network and feature film restrictions) against a major challenge based upon the First Amendment and Section 326 of the Communications Act (47 U.S.C. §326). Petitioners acknowledge this fact, but argue that because the Commission in effect could not find that the Rule had yet achieved all its intended objectives this issue must be revisited. They also contend that the revisions in the Rule violate the First Amendment and Section 326.

Given the Commission's basic rationale for retaining a form of Prime Time Access Rule, namely that there had been insufficient test to determine whether it can achieve the objectives intended, Petitioners' argument for revisiting the free speech/no censorship issue is without merit. The Report and Order makes clear that the Commission is still pursuing the same objectives which the Court relied upon in Mt. Mansfield, and an ultimate Commission decision on the Rule's future cannot be made until the Rule has had a more meaningful test. This would appear dispositive.

Turning to Petitioners' contentions that the revisions in the Rule contravene the First Amendment or Section 326, these are similar to the contentions advanced in the NAITPD and Westinghouse Briefs in Case Nos. 74-1168 and 74-1283. For ABC's response, the Court's attention is respectfully directed to the Brief for Intervenor ABC in those cases, pages 25-31.

Petitioners do make the additional argument that the expanded ban on feature films is objectionable. However, inasmuch as this Court approved a ban on feature films which had been shown in the market within two years in the Mt. Mansfield decision, there would appear little basis

for distinguishing that ban from the total ban now adopted for similar reasons. Also, the overall effect of the revised Rule with respect to feature films may prove a relaxation, because only the 7:30 - 8:00 p.m. period Monday through Saturday will be affected whereas under the original Rule seven full hours per week were affected. */

CONCLUSION

For the foregoing reasons the Warner-Columbia Petition for Review should be denied and the Commission's adoption of the revised Rule affirmed.

Respectfully submitted,

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April 4, 1974

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*/ Intervenor MCA, Inc. and other movie interests have filed Petitions for Reconsideration with the Commission challenging the wisdom of the feature film ban. MCA has attached a copy of its petition to its Brief in this Court. ABC has opposed the Petitions for Reconsideration before the Commission. A copy of the ABC Opposition is Appendix A hereto.

APPENDIX A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	Docket No. 19622
	)	
Consideration of the operation	)	RM-1967
of, and possible changes in	)	RM-1935
the "prime time access rule,"	)	RM-1940
Section 73.658(k) of the	)	RM-1929
Commission's Rules	)	

To: The Commission

OPPOSITION TO PETITIONS FOR RECONSIDERATION

American Broadcasting Companies, Inc. (ABC), by its attorneys, hereby opposes the Petitions for Reconsideration filed by MCA, Inc. (MCA), United Artists Corporation (UA) and Motion Picture Association of America, Inc. (MPAA) (collectively, Petitioners) in the above-captioned matter.*/ ABC also submits a Comment in Section IV of this Opposition with respect to the Petition for Reconsideration of Sandy Frank Program Sales, Inc. (Sandy Frank). In support thereof the following is shown:

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*/ A Petition for Reconsideration filed by Screen Gems Division of Columbia Pictures Industries, Inc. has been dismissed.

I. Background

The MCA, UA and MPAA Petitions for Reconsideration, filed by components of the Hollywood motion picture industry, come after exhaustive Commission rule making proceedings in the nature of an overview of the Prime Time Access Rule (47 C.F.R. §73.658(k)) which culminated in the Commission's Report and Order released February 6, 1974 adopting certain revisions in the Rule (restyled "Evening Programming Requirements"). Although the Commission has relaxed the Rule in some respects, consistent conceptually with some positions Petitioners advanced in the rule making proceeding, it did tighten the rule in at least one respect -- namely, as to the use of motion pictures in the access period. Specifically, the Commission provided that the 6 half hours per week now restricted by the revised Rule may not be utilized to broadcast any motion picture regardless of when or whether it has been previously broadcast in the market, whereas formerly the entire 7 hours per week of access time were unavailable to motion pictures which had been broadcast in the market within the past two years. MCA, UA and MPAA seek reconsideration solely with respect to this aspect of the revised Rule.

Apart from the aforementioned Petitions for Reconsideration, Petitions for Review of the Commission's Report and Order have been filed with the United States Court of Appeals for the Second Circuit by National Association of Independent Television Producers and Distributors (NAITPD), Westinghouse Broadcasting Company, Inc. (Westinghouse) and Warner Bros., Inc. and Columbia Pictures, Inc. (Warner-Columbia). Basically, the NAITPD and Westinghouse petitions challenge the Commission's adoption of any changes in the Rule. On the other hand, Warner-Columbia challenge the Commission's failure to repeal the Rule. Various parties have intervened or sought leave to participate as amicus curiae in support of those seeking review or in support of the Commission. ABC has supported the Commission's Report and Order against the extremes represented by the positions of NAITPD/Westinghouse on the one hand and Warner-Columbia on the other.

NAITPD and Westinghouse also sought stay relief from the Court -- to postpone the effective date of changes in the Rule until September 1975. Although such stay relief was denied, the Court directed an accelerated consideration of the Petitions for Review on their merits. These cases will be heard at oral argument on Friday, April 5, 1974, and it is expected that the Court will issue its decision soon thereafter.

Thus, this case is in the unusual procedural posture that Petitions for Reconsideration may be pending after judicial review of the Commission's Report and Order has been accomplished

II. The Revised Movie Restriction Should be Retained

Although ABC did not support adoption of a tightened movie restriction such as the Commission decided upon, there are a number of reasons why this restriction, now that it has been adopted as part of the overall resolution of this proceeding, should not be disturbed.

First, the Commission saw fit to refine the Prime Time Access Rule in the interest of making it more effective and to further other public interest objectives. Obviously, a delicate balancing of factors was involved. Some of the relaxations which were adopted can be expected to restrict the opportunities for those independent producers who are competing in the access time market, whereas tightening of the movie restriction is an off-setting factor. In such a circumstance it is important, if independent producers for the access market are to continue to have the competitive opportunities which the Commission intended them to have and which they probably need, that

the revised movie restriction be kept intact. What the Commission has in effect done is to insure the access producers (which need not exclude the movie companies if they were to elect to accept the competitive challenge) a more precise and known time slot which is cleared of network, off-network and movie product. Those producers, whom the Commission sought to encourage by adoption of the Rule in the first instance, deserve that opportunity if the Rule is to have the meaningful test which the Commission indicated it intends.

Second, because the Commission's resolution of this proceeding was in the nature of a compromise of conflicting public interest considerations, it is only fair and appropriate that the entire compromise be retained. If the delicate balance of public interest considerations, which includes the movie restriction, is to be reopened, then presumably all elements of the compromise of considerations would have to be re-examined. These matters simply cannot be taken in isolation one from the other.

Third, the tightened movie restriction is not a major departure from the existing Rule. The Commission has already found, and the Court of Appeals has affirmed in Mt. Mansfield Television, Inc. v. FCC, 412 F.2d 470 (D.C. Cir. 1971), that some movie restriction is appropriate.

The Commission's desire to simplify this restriction and its administration is understandable. The modest change represented by the revised Rule is a reasonable solution to this problem.

Fourth, there is a need for administrative finality in a matter of this sort. Experience to date with the Prime Time Access Rule has been characterized by a large measure of uncertainty -- as to the Rule, its interpretation, and its future. There is considerable reason to conclude that the Rule has not achieved its full potential in part because there has been so much uncertainty. The Commission's Report and Order reflects an intention to bring this uncertainty to an end, and to establish clear-cut ground rules which will give the revised Rule a fair opportunity to work effectively. In short, the Commission should stand by its decision and not further confuse matters by changing that decision.

III. On an Overall Basis, the Revised Rule is Beneficial to the Movie Companies

Petitioners variously argue that they are adversely affected by the movie restriction since an important aspect of their business is the licensing of movies to individual television stations. This contention needs to be examined in some perspective.

The movie companies are the principal suppliers of television entertainment programming for prime time. Not only are their theatrical features an important part of the three networks' schedules, but these companies also produce the bulk of the network series programming and movies made for original television exhibition. For example, in 1972, 69% of the total funds expended by the ABC Television Network for prime time programming, including the limited amount it produced, went to the major movie companies.

Of course, the movie companies provide programming not just to the networks but also to the stations and they license not only their motion pictures but also their other program product, which is typically off-network. However, the movie companies have, for their own reasons, generally avoided the access time market.

While Petitioners contend that their feature films are not presently being used in prime time schedules by local stations, this is somewhat misleading. Their feature film and other product is on prime time television through network originations and it is also highly prevalent on independent stations, which are operative in most of

of the top 50 markets.*/

In general, the movie companies have benefitted from the adoption of Section 73.658(j) of the Commission's Rules and they can be expected to benefit from the adoption of revisions in Section 73.658(k), even if one aspect of the revisions displeases them. Pursuant to the Syndication and Financial Interest Rules the network companies are no longer competitors in syndication and they do not bargain for subsidiary rights and interests in programs produced in whole or in part by the movie companies. Further, the Commission's revisions in the Prime Time Access Rule are essentially favorable to the movie companies. First, the Commission has eliminated the Rule as to Sundays, thus opening up the prospect of a 4-hour prime time market on each network for these principal suppliers of network programming. Second, by specifying the access period as 7:30 - 8:00 p.m., the Commission has allowed the movie companies to compete for the 7:00 - 7:30 p.m. period with their off-network product. This offers potential financial benefits to the movie companies in their capacity as program syndicators.

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*/ Top-50 markets with one or more independent station(s) account for 83% of the television households in the ARB ADI's of all top-50 markets.

As ABC pointed out in its Supplemental Comments of July 13, 1973, the movie industry is generally recognized to be in an improving competitive position. Thus, Business Week for June 23, 1973 portrayed a generally favorable picture of this industry -- owing in part to a long-needed re-examination of outmoded business practices resulting in greater efficiency.

The trend to which we refer would hardly appear to have changed based upon the MCA, Inc. 1973 Annual Report, recently released. That Report discloses that new long-term contracts for television series and movies for television by MCA, Inc. are at record levels. Future revenues from existing syndication contracts plus contracts with networks for production and exhibition of television series and feature-length television movies now total $275 million, up substantially from a year before. MCA net income for 1973 was $25.6 million, up 23% from 1972. Broadcasting, April 1, 1974.

In light of these considerations and viewing the Commission's regulatory measures in their totality, the movie companies should not be heard to complain that some aspect of the Commission's regulatory program, such as the feature film restriction on 6 half hours per week affecting network-affiliated stations in the top-50 markets only, does not happen to benefit them.

IV. The Sandy Frank Petition Should Also Be Denied

The Sandy Frank Petition deals not with a single aspect of the revised Rule but rather with whether revisions should have been made at all. Sandy Frank asks the Commission, in effect, to go back to the original Rule.

Although ABC, in its Comments and Oral Argument, did not propose most of the specific changes which have been adopted in the revised Rule and basically favored retention of the original Rule, it does not support the Sandy Frank Petition. First, it is clear that the Commission had to balance a variety of public interest factors in resolving this proceeding. Some of those factors were not consistent with retention of the original Rule in all respects. ABC believes that the Commission has reached a fair and reasonable compromise, which holds out the prospect of a more effective rule as well as other benefits. As the Commission suggested in its Report and Order, a compromise seldom completely satisfies anyone, and that is probably the case here. However, ABC believes that the best course is for all industry elements to put this issue behind them for the next several years and get on with making the Rule which the Commission has adopted work effectively. This is what ABC proposes to do and this is what the Commission should expect all industry elements to do.

Second, it cannot be too strongly emphasized the importance of bringing this proceeding to an end and establishing a condition of certainty. All parties -- networks, independent producers, movie companies, stations, etc. -- need to know what the ground rules are. Uncertainty has permeated this situation from the beginning. It is unfortunately true that business judgments must go forward while Commission proceedings are still open. A decision having been reached and announced to the world, continuity of decision and administrative finality assume major if not overriding importance.

V. Conclusion

For the foregoing reasons, ABC believes that all of the Petitions for Reconsideration now pending before the Commission should be denied. Further, we urge the Commission to take this action as promptly as possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas N. Frohock, hereby certify that the "Brief for Intervenor American Broadcasting Companies, Inc." in Case No. 74-1348 has been served this fourth day of April 1974, by causing to be delivered true copies thereof to the following at the indicated addresses:

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